

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Alternate Power Source, Inc.

v.

ISO New England Inc.

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Docket No. EL00-109-000

**MOTION OF THE MAINE PUBLIC UTILITIES COMMISSION
FOR DISCLOSURE OF INFORMATION**

In accordance with Rule 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), the Maine Public Utilities Commission (“MPUC”) hereby requests the Commission to direct ISO New England Inc. (“ISO-NE”) to disclose the information that ISO-NE has filed under seal in this proceeding pursuant to 18 C.F.R. § 388.112, or, in the alternative, to make limited disclosure of information to state regulators. Specifically, the MPUC requests that the Commission release the unredacted copies of ISO-NE’s September 21, 2000 Answer in this case. Counsel for the MPUC has contacted ISO-NE and is authorized to represent that ISO-NE does not oppose public disclosure of its unredacted Answer. Alternatively, the MPUC asks that the Commission provide to state regulators that are parties to this proceeding (or direct the ISO to provide to such regulators) unredacted copies of the ISO’s September 21, 2000 Answer in this case subject to an appropriate protective order. A Proposed Protective Order is appended hereto as Attachment E. The MPUC also asks the Commission to clarify that under the NEPOOL Information Policy the ISO may disclose confidential market data, such as the bid data at issue in this case, to state utility regulatory commissions if the agency issues a protective order to protect the confidential nature of the material.

I. BACKGROUND

On September 11, 2000, Alternate Power Source, Inc. (“APS”) filed a complaint against ISO-NE pursuant to sections 206 and 306 of the Federal Power Act and Rule 206 of the Commission’s Rules of Practice and Procedure. APS asserts that ISO-NE improperly failed to mitigate the \$3,240 per MW/month market clearing price that resulted from the Installed Capability (“ICAP”) auction in April, 2000. See Complaint at 7-9. APS contends that ISO-NE’s failure to mitigate the April ICAP price is inconsistent with the mitigation measures implemented by the ISO in January through March, 2000. *Id.* at 6-7. APS also states that there is evidence of anomalous conduct in the April ICAP market that warrants mitigation of the market clearing price by ISO-NE. *Id.* On September 21, 2000, the MPUC filed a timely notice of intervention and comments in this proceeding. The MPUC appended to its notice a copy of a letter, dated September 1, 2000, from the Maine Commissioners to Philip Pellegrino of ISO-NE. This letter expressed concern about the final April ICAP clearing price and the preliminary clearing prices for subsequent months.

On September 21, 2000, ISO-NE filed an answer (“Answer”) to APS’s Complaint. In its Answer, the ISO observed that the core contention of APS’s Complaint was that ISO-NE’s refusal to mitigate April 2000 ICAP prices was inconsistent with the ISO’s mitigation of ICAP bids in January through March 2000. Answer at 2-3. The ISO denied that its actions in April 2000 were inconsistent with its actions in the preceding months because “[w]ith respect to the April 2000 ICAP bids, the ISO did not observe a continuation of the bidding behavior it had detected in January through March 2000, or other conduct meriting investigation, and therefore mitigation of bids was not appropriate under Market Rule 17 for that month.” *Id.* at 9. In purported support of the claim that anomalous bidding behavior did not continue in April 2000,

ISO-NE's Answer presented, under seal, ICAP bid information for April 2000. *See Id.* at 13-14; Chart 1; Exhibits 1-4. The ISO's Answer also noted that it had identified potential anomalous conduct in the ICAP markets during the months of May through July 2000, and, accordingly, it was deferring settling the market for those months pending direction from the Commission. *Id.* at 14-17. To illustrate its concerns regarding bidding anomalies, the ISO also submitted, under seal, bid information for the months of May through July 2000. *Id.* at 14-17; Chart 1; Exhibits 1-4. The ISO requested that the bid information receive confidential treatment pursuant to 18 C.F.R. § 388.112. *Id.* at Transmittal Letter, pages 1-2.

In the MPUC's September 1, 2000 letter to the ISO (appended to the MPUC's Notice of Intervention), the MPUC requested ICAP bid stacks for the months of April and May. In the ISO's September 25, 2000 response to this letter, appended hereto as Attachment A, Mr. Pellegrino stated, "In regard to your specific request for the ICAP Auction Market bid stacks for April and May, we will provide that data upon the receipt of a protective order that will ensure confidential treatment of this commercially and market sensitive data." On October 6, 2000, the MPUC provided the ISO with the requested protective order, and expanded its information request to include ICAP bid data through July, 2000, as well as an unredacted copy of the ISO's Answer in this docket. *See* Attachment B, appended hereto. On October 20, 2000, the ISO posted the MPUC's request for information on its web site and stated "ISO-NE intends to fully respond to the Maine Commission's request under the Protective Order issued with the requests." *See* Attachment C, appended hereto. On October 26, 2000, ISO-NE orally notified the MPUC that it had received objections to the provision of the requested material to the MPUC and requested that the MPUC make its request for disclosure to the Commission rather than to the ISO.

II. ARGUMENT

A. ISO-New England's Unredacted Answer Should Not Receive Confidential Treatment

Under the current NEPOOL Information Policy, as modified by the Commission's decision in *NSTAR Services Company v. New England Power Pool*, Docket No. EL00-83-00, the ICAP bid data contained in the ISO's unredacted answer, at least for the months of May through July, are considered confidential information. ISO Information Policy § 2.1. In *NSTAR*, the Commission determined that bid data should be released after a six-month lag. *NSTAR Services Company v. New England Power Pool*, 92 FERC ¶ 61,085 at 61,201.¹ The Commission has found that the six-month lag guards against the risk that the release of the data will promote gaming and/or collusion among entities bidding into the market. While six months has not yet elapsed with respect to all of the bid data at issue in this case, the MPUC requests that the ISO's unredacted Answer containing confidential bid data be publicly disclosed for the following reasons: (1) A three-month rather than a six-month lag period provides a workable balance between allowing for market transparency and providing safeguards against market abuses; (2) the Commission's elimination of the ICAP auction greatly reduces the risk that ICAP bid information will facilitate collusion; and (3) the information in the ISO's unredacted answer is crucial to the determination of the merits of the claims made by the ISO in its answer to APS's Complaint. Further, the ISO is now in agreement that confidential treatment should not be accorded to its unredacted Answer.

¹ Without discussing the merits of a proposal for a three-month rather than a six-month lag for the disclosure of bid information, the Commission stated, "Keeping the information confidential for six months before releasing the data will sufficiently protect the commercial sensitivity of the

1. A Three-month Lag Time Before Releasing Confidential Bid Data Provides a Workable Balance Between Allowing for Market Transparency and Providing Safeguards against Market Abuses

In the NSTAR case, the ISO offered the affidavit of Peter Cramton to argue for the release of individual bid data after a three-month lag. Mr. Cramton stated:

I support NSTAR's request that individual bid data be released after a three-month lag. The release of this data is important to enhance transparency, planning, and the study of the markets. The individual bid data enables participants, regulators, and other observers to conduct a detailed analysis of the markets. The researcher can get a better understanding of what makes up the aggregate supply curve and why. Various withholding strategies can be examined. Likely inefficiencies can be seen. With the release of resource specific information, researchers can get a much better sense of bidding strategies, and how those strategies depend on the portfolio of resources. I believe a three-month lag is warranted. Individual bid data is especially useful in supporting tacit collusion if the information is released too quickly. A three-month lag is sufficient to avoid such a collusive use of the information.

Cramton Affidavit at 4, attached to the Motion to Intervene, Comments and Protest of ISO-New England, Docket No. EL00-83-00. The MPUC also filed comments supporting the release of information after a three month lag. Notice of Intervention and Comments by the Maine Public Utilities Commission at 10-11.

At the time that the ISO made its filing in NSTAR it had already presented a similar proposal for bid disclosure before the NEPOOL Information Policy Working Group. The ISO proposed that individual bid data be released after three months, aggregate bid data (supply curves) be released after two months and outage data be released after one month. According to the ISO, this proposal reflected the advice of the ISO's consultant, Peter Cramton. The MPUC supported the ISO proposal, believing that it provided a workable balance between the need for transparency to facilitate market monitoring and protection from market abuse. The proposal did

data." Rehearing of the Commission's decision on the issue of the proper time frame for bid disclosure (among other issues) is currently pending.

not obtain the supermajority required by NEPOOL governance rules, however, and the matter was sent back to the working group. The working group has not addressed these disclosure issues since the Participants Committee vote.

This case presents the perfect opportunity for the Commission to address at least one of the disclosure issues that appear to be grid locked at NEPOOL. Therefore, the MPUC requests that, in response to the confidential treatment sought by the ISO, the Commission find that ICAP bid information for April through July may now be publicly released and that other bid information may also be released after three months.

2. The Elimination of the ICAP Auction Greatly Diminishes any Risk of Facilitating Collusion through the Release of ICAP Bid Data for April through July.

The purpose of the Commission's policy on providing a six-month lag time prior to the release of bid data is "to help prevent collusive behavior." *Central Hudson Gas & Electric Corporation et al*, 88 FERC ¶ 61,138 at 61,397 (1999). In his affidavit in the NSTAR case, Mr. Cramton discussed how the early release of supply curves (aggregated bid data) can facilitate tacit collusion:

Knowledge of the aggregate supply curve is critical information for a large generator deciding how best to exercise market power. The generator gets to see the likely consequence of its raising a bid block in terms of both the clearing price and the quantity that it suppliesWith a one day lag, I fear that tacit collusion is a serious problem.

Cramton Affidavit at 3, ISO Motion to Intervene and Protest, *NSTAR*, Docket No. EL00-83-00.

The type of bidding strategy that might be revealed from the April through July ICAP auction bids relate to the now-terminated ICAP auction. There is no reason to believe that this information would be of much value in determining bilateral market strategies.

3. The ISO's Assertions Cannot Be Evaluated Absent the Release of the Bid Data Provided in its Unredacted Answer

In its Answer, ISO states that “with respect to the April 2000 ICAP bids, the ISO did not observe a continuation of the bidding behavior it had detected in January through March 2000, or other conduct meriting investigation, and therefore mitigation of bids was not appropriate under Market Rule 17 for that month.” Redacted Answer at 9. For the May through July ICAP bids, however, the ISO states:

[T]he ISO's analysis of the May-July bidding patterns is consistent with a disturbed market that has not settled into a competitive pattern. This bidding pattern may be inconsistent with a competitive market. It could be exhibiting “price following” behavior by a limited number of bidders with substantial market share. On the other hand, the pattern could represent a modification of bidding strategies to reflect experience with the market, the past mitigation actions of the ISO, and the decision of the Commission to terminate the auction market.

ISO Answer at 18-19. Without access to the bidding patterns and bid stacks, litigants will be unable to evaluate the conclusions reached by the ISO either with regard to April ICAP bids, or ICAP bids for May through July.

The Commission has refused to grant confidential treatment when the party seeking confidentiality has failed to meet its burden of justifying its request. *ANR Pipeline Company*, 65 FERC ¶ 61,280 at 62,305-306 (1993). In meeting that burden, the party seeking confidential treatment must show that the harm that would result from public disclosure outweighs the need for public disclosure. *Id.* When the information is necessary for interested parties to verify calculations made by the holder of the information, confidential treatment has been denied. *See El Paso Electric Company*, 89 FERC ¶ 61,237 at 61,699-700 (1999). Here the unredacted answer is necessary for interested persons to verify the claims made by the ISO that (1) the April ICAP bids did not warrant investigation or mitigation and (2) that the May through July bids may

show some anomalous behavior. Moreover, the ISO now agrees that its unredacted Answer should be made public. For all of these reasons, the ISO's unredacted Answer should not receive confidential treatment.

B. State Utility Regulatory Agencies Are Entitled to Have Access to Confidential Market Information

If the Commission determines that the ISO's unredacted Answer should be afforded confidential treatment, the MPUC requests that the Commission disclose the Answer under protective order to all of the New England state utility regulatory commissions that have intervened individually or through the NECPUC in this matter. Even if the Commission publicly discloses the ISO's unredacted Answer, the MPUC strongly urges the Commission to clarify that the ISO may disclose confidential market information to state utility regulatory agencies for market monitoring purposes.

Release of this information to state utility regulatory agencies is appropriate because the Commission's concern about collusion that has warranted confidential treatment of bid information is not implicated by the release of this data to state utility regulatory commissions pursuant to an appropriate protective order. State commissions generally have an obligation to monitor the wholesale markets impacting retail customers in their respective states and should be entitled to information required to perform this monitoring function.² The Commission has several times specifically endorsed the notion that state regulators should have access to confidential market information for market monitoring purposes.

² Maine's retail competition legislation in fact both authorizes and requires the MPUC to take an active role in monitoring the wholesale market because the success of retail competition in Maine is directly linked to the operation of a competitive wholesale market. *See* 35-A M.R.S.A. § 3215, Appended hereto as Attachment D.

The Commission first addressed this question in *Pacific Gas and Electric Company and Southern California Edison Company et al.*, 81 FERC ¶ 61,122 (1997):

We find the ISO and PX proposal to allow the compliance divisions to have the discretion to submit reports directly to regulatory agencies to be a sound response to the concerns that the ISO and PX boards, comprised in part of governors representing Market Participants, could block the release of such reports. Any reports submitted to the Commission should also be made available to the California Commission, the CEC, and the state regulatory commissions of any state which has one of its utilities participating as a Market Participant.

(emphasis added) Id. at 61,553.

The Commission reached a similar conclusion in *Central Hudson Gas & Electric Corp., et al.*, 88 FERC ¶ 61,137 at 61,397 (1999). There, it clarified, at the request of the New York Public Service Commission, that “the New York Commission should receive the same information that the Commission receives from the ISO with respect to the ISO’s monitoring and mitigation efforts.”).

Finally, the Commission explained in Order 2000:

Market monitoring also will be a useful tool to provide information that can be used to assess market performance. This information will be beneficial to many parties in government as well as to power market participants. *This includes state commissions that protect the interests of retail consumers, especially where they are overseeing the development of a competitive electric retail market.* We note, however, that the market monitoring function for the RTO does not limit the ability of each state within the RTO’s region or other authorities to decide the nature and extent of its own market monitoring activities.

Regional Transmission Organizations, FERC Statutes and Regulations ¶ 31,089 at 31,156 (1999) (emphasis added).

In short, this Commission has found that state regulators should have access to market information necessary for monitoring purposes. This policy is grounded in the Commission’s recognition that state regulators have a strong interest in ensuring that wholesale markets

function properly because of the effect of wholesale markets on the operation of competition in state retail markets. A decision that shuts out state regulators from the market monitoring process would, therefore, be contrary to this Commission's policy of including state regulators in the market monitoring process.

In fact, prior to the ISO's request that the MPUC make its request for the ISO's unredacted answer to the Commission, the MPUC understood that, as a state public utilities commission, it was entitled to access to market data that would allow it to monitor the wholesale markets as long as it issued a protective order to provide for confidential treatment of such data. The basis for this understanding is found in the NEPOOL Information Policy, Market Rule 17, and the Commission's decisions favoring a strong state role in market monitoring.³

The NEPOOL Information Policy and Market Rule 17 make clear that state public utility commissions should have access to confidential market data. The NEPOOL Information Policy directs the ISO to respond to a request for confidential information in the following manner:

If the information is *Confidential Information*, ISO New England or NEPOOL, as the case may be, will refer the request to the Furnishing Entity and will not release the requested information unless it is directed to do so by the Furnishing Entity or ordered to do so by a court or regulatory authority with jurisdiction over such matters. The Furnishing Entity shall bear any costs reasonably incurred by NEPOOL and/or ISO New England in opposing the issuance of such an order requiring disclosure of the Furnishing Entity's *Confidential Information*. Notwithstanding the foregoing, upon the request of a regulatory agency having appropriate jurisdiction and subject to an appropriate confidentiality order entered under such agency's procedures sufficient to preserve the confidential nature of the information submitted, and with advance notice to the Furnishing Participant, ISO New England may submit Confidential Information to such agency. If *Confidential Information* is requested by the Furnishing Participant, ISO-New England shall provide copies of such information to the Furnishing Participant or its designee.

³ The ISO's initial agreement to provide the requested data to the MPUC indicates that it had a similar understanding concerning state regulatory agencies' entitlement to the market monitoring data as long as it is kept confidential.

NEPOOL Information Policy § 3.1.1 (emphasis added). Thus, the ISO may submit confidential information to “a regulatory agency having appropriate jurisdiction” as long as that agency issues a protective order to preserve the confidential nature of the information.

The phrase “regulatory agency having appropriate jurisdiction” is not defined in the Information Policy but language in Market Rule 17 provides guidance on the meaning of this phrase. Market Rule 17 requires that the ISO’s Quarterly Report for Regulators which contains confidential market information “will be made available to appropriate state or federal government agencies, including the FERC and state regulatory bodies, attorney general, and others *with jurisdiction over the competitive operation of electric power markets*, as well as to NEPOOL participants.”⁴ Market Rule 17 also requires that, “in addition to the information on the market and mitigation provided in the monthly, quarterly and annual reports, the ISO shall inform the *jurisdictional state and federal regulatory agencies*, as well as the NEPOOL Market Committee, if the ISO determines that a market problem appears to be developing that will not be adequately remediable by market rules or mitigation measures.” The Commission has interpreted the phrase “jurisdictional state and federal regulatory agencies” to include state commissions and the FERC. *New England Power Pool*, 85 FERC ¶ 61,379 at 62,479 (1998).

Thus, consistent with the Commission’s interpretation of the term “jurisdictional state agencies” in Market Rule 17 and the language in Market Rule 17 giving meaning to the term “regulatory agency having appropriate jurisdiction,” the NEPOOL Information Policy should be interpreted to allow the ISO to disclose confidential information to the MPUC and other New England Conference of Public Utilities Commissioners (“NECPUC”) member regulatory

⁴ It is not clear which NEPOOL Participants are entitled to the Quarterly Reports. As a practical matter, the MPUC understands that the unredacted reports are not supplied to NEPOOL Participants.

commissions if the regulatory agency issues a protective order to preserve the confidentiality of the material.

The MPUC is aware of an argument that the term “appropriate jurisdiction” in the Information Policy should be read to mean that the ISO may disclose information to a state regulatory agency *only* if that agency has jurisdiction over the entity providing the information. Under this interpretation, state regulators may have access *only* to information that they are already entitled to request directly from the specific entity which they regulate. This interpretation renders the above-quoted excerpt from section 3.1 of the Information Policy meaningless and is inconsistent with the provisions of Market Rule 17 allowing state regulators special access to market data in the ISO’s quarterly reports.⁵ It also leads to an absurd result. Under such an interpretation, state regulators are entitled to market monitoring data when the information is used in the ISO’s quarterly market monitoring report but may not have access to the same information prior to the issuance of the report. There can be no logical basis for allowing state regulators access to the information in one instance and not in the other. Finally, such an argument would be inconsistent with the Commission’s policy that state regulators should have access to confidential market information for market monitoring purposes. *See Central Hudson*, 88 FERC at 61,397.

For the reasons discussed above, the Commission should clarify that under the NEPOOL Information Policy, the ISO may provide, under protective order, confidential market data to state regulatory commissions such as the MPUC and other members of NECPUC so that these public

⁵ There may be some data that is unavailable to certain government agencies absent compulsory process. See Market Rule 17 Section II (D). These circumstances are not specified either under Market Rule 17 or the Information policy. What is clear from Market Rule 17 and Commission precedent is that the ISO may disclose, under a protective order, market monitoring and mitigation data to state public utilities commissions for market monitoring purposes.

utility commissions may use the data for monitoring purposes. Even if the ICAP bid data is publicly disclosed as requested by the MPUC, judicial economy will be served by clarifying this point now, so that litigants and market participants can focus on the numerous substantive issues facing the New England wholesale market.

III.

CONCLUSION

The Commission should not grant confidential treatment for the ISO's unredacted Answer in this case. However, if the Commission determines that confidential treatment is warranted, it should make the ISO's unredacted Answer available under a protective order to the MPUC and other New England state regulatory commissions which intervened either individually or as members of NECPUC. Even if the Commission makes the unredacted answer publicly available, it should clarify that the ISO may release under a protective order confidential market data to state regulators for market monitoring purposes.

Respectfully submitted,

THE MAINE PUBLIC UTILITIES COMMISSION

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DATED: November 13, 2000

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 22nd day of February, 2000.

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